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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1965

No. 440

UNITED STATES OF AMERICA,
Petitioner,
vs.
UTAH CONSTRUCTION AND MINING CO.,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI to the United States Court of Claims

OPINION BELOW

Petitioner seeks to review the decision of the United States Court of Claims, entered on December 11, 1964, and reported at 339 F. 2d 606. That decision was given upon the Government's request for review of a commissioner's order in the nature of a pre-trial ruling. The commissioner's memorandum decision is unreported

but is contained in the Government's Petition as Appendix B.

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court under 28 U.S.C. Section 1255(1). For reasons hereafter given, respondent respectfully submits that petitioner is not entitled to invoke such jurisdiction, both because the review would be an improper assumption of original jurisdiction, and because the review would not be a sound exercise of judicial discretion.

QUESTIONS PRESENTED

A. May this Court take jurisdiction under 28 U.S.C. Section 1255(1) when such a taking would be an improper assumption of original jurisdiction?

B. May this Court take jurisdiction under 28 U.S.C. Section 1255(1) when such a taking would not be a sound exercise of judicial discretion?

C. May the Court of Claims take evidence *de novo*, according to its own rules and procedures as to the order and manner of proof, in an action in that court for breach of contract, or must all actions connected with the contract—whatever the nature of the claim—be decided only upon the factual findings of the agency board?

STATUTORY AND CONTRACTUAL PROVISIONS INVOLVED

Respondent's argument against granting the writ is concerned with the following:

Contract Article 15;
28 U.S.C. 1254(1);
28 U.S.C. 1255(1).

STATEMENT OF THE CASE

1. Nature of the controversy.

This case arose out of a contract between the United States acting through the Atomic Energy Commission ("petitioner" or "the Government"), and Utah Construction and Mining Co. ("Utah" or "the contractor"). The work called for the construction of an aircraft nuclear propulsion assembly and maintenance facility in Idaho.

During the performance of the work Utah incurred increased costs and delays, and claims upon certain phases of the work were made pursuant to the provisions of the contract (especially Article 15, the Standard Disputes Clause). Because the relief granted by the AEC Advisory Board of Contract Appeals was unsatisfactory and incomplete, and because that board lacked authority to consider Utah's contention in its true nature, the contractor brought the action below in the Court of Claims.

2. The Administrative Claims and Proceedings.

The case now before the Court of Claims is not a severable restatement of the separate claims made before the administrative board. The petition of the contractor

states one single, cumulative claim for damages for breach of contract, based, *in part*, upon those major phases of the work which also were presented in some instances as claims under the disputes procedure; to the extent that the Court of Claims Commissioner and the Government may have stated the contractor's action otherwise, they have misread the petition in the Court of Claims.

Therefore, while that which transpired administratively as to the so-called "Shield Window claim" (or any of the other individual claims) may be relevant to an action on breach of a contract involving the installation of Shield Windows, it is not conclusive of the matter considered as a question of breach rather than performance under the contract and specifications.

Certain of the alleged factual statements of the Government's Petition need qualification:

(1) The discussion of the "shield window claim," page 5 of the Petition, is absolutely misleading. The statement attributed to the board that Utah "simply did not know how to do the job" is out of context and grossly unfair in its implication.

What the board did say (in discussion, not in its Findings of Fact) was:

> "It is well conceivable that the difficulties encountered by Utah arose in large part, if not in all, from its inexperience and from its workmanship. In other words, the conclusion can be drawn that Utah simply did not know how to do the job. *However, the Board is not convinced that anyone else knew how to do the job either*, including Corning (the window fabricator), the Architect-Engineer, or the *government*,

prior to the knowledge painfully acquired on the job." (United States Atomic Energy Commission, Advisory Board on Contract Appeals, Docket No. 76, Findings of Fact and Recommendation, pp. 18-19; emphasis added.)

On the other hand Finding of Fact No. 12 states:

"The delays encountered, as set forth in Finding No. 6, were due to unforeseeable causes beyond the control and without the fault or negligence of Utah and resulted in delay of completion for a period of time extending until after November 2, 1965."

Finding No. 7: "Utah exercised the best workmanship and ability which it was capable of producing."

(2) The Government's statement as to the "pier drilling claim" (see Petition, page 5) is incomplete. The Board found (Ruling No. 11), Docket No. 87, Findings of Fact and Recommendation of the Advisory Board on Contract Appeals) that some delay was caused in the drilling by faulty specifications but that this did not *proximately cause* delay in the final work because of other disputes as to concrete aggregate. Such a finding on a question of law is beyond the Board's authority and is made even more inappropriate by the Board's admission that the concrete aggregate dispute was not before it. (See Findings, *ibid.* p. 13.)

Accordingly, Utah is entitled to a determination in the Court of Claims as to the cumulative effect of these delays and errors by the Government, and a proper judicial determination on the question of proximate causation, unhampered by the limitations imposed upon individual claim presentation under the administrative procedure.

(3) On the "shield door" phase of the work the important consideration is not whether the specific claim based on that phase of the work was timely filed or was released, but whether, upon a consideration of all the facts, the failure of the Government to properly design this phase contributed to the breach of contract. The Board said:

> "There is no question but that the *bidding documents with respect to the immediate problem were inadequate,* although the specifications did indicate to the contractor in sufficient detail the nature of the equipment it would have to house." (Findings of Fact & Recommendation, Advisory Board of Contract Appeals, Docket 95, page 6.) (Emphasis added.)

The Board then went on to shift the burden for faulty plans onto Utah, saying it should have recognized the problem, and should have objected.

(4) The Government's characterization of the facts surrounding the "concrete aggregate" phase of the project fails to point out a matter important to a breach of contract action. The contracting officer had ruled that Utah's claim for costs for delay due to the poor and dirty condition of concrete aggregate was one for breach of contract and so beyond his authority under the "disputes" clause.

The Hearing Examiner, however, simply ruled the claim untimely and so did not meet the issue of breach, nor of course did he consider the cumulative effect of the facts of breach relative to the other claims.

3. The Proceedings in the Court of Claims.

At this point Utah's contention should be clear. A single and cumulative claim is alleged, and it is based upon a breach of contract resulting from the delays, misrepresentations and failures to perform on the part of the Government, including those occurring upon the major phases of the project which also were the subject of specific administrative claims.

SUMMARY OF ARGUMENT

A. This Court May Not Take Jurisdiction of This Case Because Such Would be an Improper Assumption of Original Jurisdiction. The Opinion Below is a Ruling of the Court of Claims Which is Neither a Final Decision nor an Interlocutory Order as to Which Review May be Properly Taken.

B. Assuming Arguendo That This Court May Take Jurisdiction of the Case Below Under 28 USC 1255(1) Such a Taking Would Not be a Sound Exercise of Judicial Discretion for the Reasons That: (1) The Opinion Below Followed the Rule of *United States v. Carlo Bianchi*, 373 US 709, (2) There is no Inconsistency or Conflict Between the Rulings of This Court and the Court of Claims, and (3) the Writ would be Premature and Would interrupt the Decisional Process of the Court of Claims.

C. The Court of Claims has Properly Ruled the Action Below to be for Breach of Contract and it May Take Evidence *de Novo* According to its Own Rules and

Procedures as to the Order and Manner of Proof; the Contention of the Government, That All Actions Connected With Contract—Whatever the Nature of the Action—Must be Decided Upon the Factual Findings of the Agency Board, is Erroneous and Unsound Governmental Policy.

1. The Action pleaded by the contractor in the Court of Claims is for breach of contract, and is not dependent upon the individual claims heard by agency boards as to certain phases of the work.

2. The contention of the Government that all actions connected with the contract—whatever the nature of the action—must be decided upon the factual findings of the agency board, is erroneous and unsound governmental policy.

ARGUMENT

A. THIS COURT MAY NOT MAKE A REVIEW OF THE OPINION BELOW IN THIS CASE BECAUSE SUCH WOULD BE AN IMPROPER ASSUMPTION OF ORIGINAL JURISDICTION.

Unlike 28 U.S.C. Section 1254 there is no provision in 28 U.S.C. Section 1255 for certiorari "before or after judgment or decree." It is respectfully submitted that the issuance of a Writ of Certiorari as to the case below in its present posture would constitute an assumption of original jurisdiction not contemplated by the Constitution of the United States for the reason that there has been no judgment or decree by the Court of Claims.[1]

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[1]See Robertson and Kirkham, Jurisdiction of the Supreme Court of the United States, Section 227, n. 1 (Wolfson and Kirkham ed. 1951).

Petitioner admits that the order below ". . . is not a final judgment granting or denying relief. . . ." (Petition, page 2, n. 1), but attempts to justify its invocation of jurisdiction by claiming that the order below was interlocutory, and that review by this Court under 28 U.S.C. 1255(1) is "unrestricted."[2]

There are decisions of this Court referring to the alleged power to review interlocutory orders, including those cited by petitioner.[3] In every instance, however, the "interlocutory" order in fact was a *judgment for one of the parties* which was only denied "finality" pending an accounting or another necessary finding.

The present order below simply makes certain rulings as to the law of the case which are to be followed by the

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[2]Petitioner's reference to the Reviser's Notes on 28 U.S.C. 1255 (see Petition, p. 2, n. 1) is incomplete and misleading. The Reviser was referring to the scope of the review upon certiorari when properly granted. The complete Reviser's note makes the distinction in meaning clear:

> "The provision of subsection (a) of said section 288, for review and determination of all errors assigned, 'with the same power and authority and with like effect, as if the cause had been brought there by appeal,' was omitted as unnecessary. Review under this section is unrestricted."

In fact, as this Court has held, review under 28 U.S.C. 1255(1) is subject to the general rules applied to review of courts of appeals and to the policy statement set forth above as to non-final actions. (See Rule 19(2), Revised Rules of the Supreme Court of the United States.)

[3]Both *United States v. Caltex*, 344 U.S. 149, and *United States v. Central Eureka Mining Co.*, 357 U.S. 155, involved review by this Court after a Judgment for one of the parties.

This Court has repeatedly stated that certiorari to review a non-final action, such as one remanding a case to the district court for a new trial, should be refused in the absence of some exceptional reason. In *American Construction Co. v. Jacksonville, T. & K.R. Co.*, 148 U.S. 372, at 384 this Court so held, ". . . unless it is necessary to prevent extraordinary inconvenience and embarrassment in the case."

Commissioner in preparing his report to the Court of Claims. This is not an "interlocutory order" which finally determines any rights of the parties. The ruling was that the Commissioner should proceed to take evidence only insofar as Utah can go forward with a showing of a breach of contract and can show a remedy which was not available administratively.

Under the rules of the Court of Claims the Commissioner is charged with making findings upon the taking of evidence and shall report these findings and his recommendations for conclusions of law to the Court of Claims. (See Rule 57, Rules of the Court of Claims, Revised 1964.)

Pursuant to the foregoing rules, the Commissioner takes evidence and makes interim decisions and orders. The order now challenged is but one of a series of such rulings and will hardly be the last before his report is eventually made to the court.

After the Commissioner has made his report the Court of Claims will rule upon the case. Rule 66 of the Rules of the Court of Claims establishes the procedural nature of the Commission's ruling which is herein considered.

Upon each of the Commissioner's rulings as to what areas of the action might require evidence *de novo* the opinion below clearly indicated the non-final, non-decisional effect of those rulings. For example, as to the phase of the work involving shield windows, the Court of Claims stated:

> "It appears that the board over a period of 3 days heard testimony with respect to this claim, including

> the claim for delays, and that the transcript of this testimony runs to 453 pages, and that many exhibits were filed; hence, the commissioner suggests that the parties might well agree to stand on this record, with permission to supplement it with respect to the delay claim to such extent as they think proper. Certainly the parties ought to desist from duplicating the administrative record *but, insofar as the claim relates to damages for unreasonable delay, the parties are not foreclosed by it nor from supplementing it, if they wish.* (Emphasis added.) (Opinion below, See Government's Petition, App. A, p. 29.)

And:

> "If this claim be one for breach of contract, as our commissioner supposes, we have jurisdiction to determine it and to receive evidence *de novo.*
>
> "However, assuming the claim is not for breach of contract, we cannot agree with the commissioner that the failure of the board to consider the case on its merits gives plaintiff the right to introduce evidence *de novo* in this court. If we decide the board should have considered the claim on its merits, we should suggest to the board that it consider it on the merits and suspend proceedings here until it has had a reasonable opportunity to do so." (Id. at 28.)

How much more plainly could the court state that the ruling now under attack, and even the Commissioner's report, are not finally determinative of the rights of the parties?

The Rules of the Court of Claims do not define an interlocutory order. Corpus Juris Secundum, Vol. 47, Page 85 says it is:

"Something intervening between the commencement and the end of a suit which decides some point or matter, but which is not a final decision of the whole controversy."

But even if the opinion below can be dubbed interlocutory in the general sense, it is certainly unlike the cases cited by the Government in n. 1, Page 2 of the Petition. The opinion below is more like the situation in *Montgomery Ward & Co. v. Collins Estate Inc.* (CASC 1956) 237 F.2d 253, wherein the court held that an order in an action at law giving answers to certain basic questions involved in a controversy between parties, and referring the case to a special referee to hear evidence and state an account between the parties in accordance with the law as laid down in such order, was not a final order in the cause and was not within the class of interlocutory orders from which an appeal is allowed.

Accordingly, we respectfully submit this Court may not take jurisdiction of the case in its present posture by Writ of Certiorari.

B. ASSUMING ARGUENDO THAT THIS COURT MAY TAKE JURISDICTION OF THE CASE BELOW UNDER 28 U.S.C. 1255(1) SUCH A TAKING WOULD NOT BE A SOUND EXERCISE OF JUDICIAL DISCRETION FOR THE REASONS THAT (1) THE OPINION BELOW FOLLOWED THE RULE OF UNITED STATES v. CARLO BIANCHI, 373 U.S. 709, (2) THERE IS NO INCONSISTENCY OR CONFLICT BETWEEN THE RULINGS OF THIS COURT AND THE COURT OF CLAIMS, AND (3) THE WRIT WOULD BE PREMATURE AND WOULD INTERRUPT THE DECISIONAL PROCESS OF THE COURT OF CLAIMS.

1. The Court of Claims followed this Court's ruling in the Bianchi case.

Review is here sought of an order affirming and amending in part the Court of Claims Commissioner's ruling on what areas of the claim require trial. The Court of Claims held that the findings of fact of the Contracting Officer and the Board of Contract Appeals are not final because the action is not a dispute arising under the contract.

This decision that the action is not subject to the "disputes" clause of the contract was reached after the parties had submitted briefs to the Commissioner, after judicious consideration of the specific facts of the case and the application of the *Bianchi* decision by the Commissioner, and after submission of briefs and upon oral argument by the parties before the Court of Claims itself.

In holding this case to be one for breach of contract, and not one arising under the contract, and accordingly not subject to the *Bianchi* doctrine of limited review, the Court of Claims carefully followed the direction of this Court. In response to the Government's argument that the *Bianchi* rule was being ignored, the Court of Claims said (339 F.2d 606 at p. 609):

"Defendant contends that since the contract gives to the contracting officer and the head of the department authority to make findings of fact concerning *all* disputes, they have authority to make findings concerning a dispute over whether the contract had been breached. This contention cannot be sustained. The contract plainly limits their authority to make such findings to 'disputes concerning questions of fact *arising under this contract.*' This means a dispute over the rights of the parties given by the contract; it does not mean a dispute over a violation of the contract."

The following conclusion (after which the Court of Claims made general rulings as to each of the phases of the breach of contract action), is important:

"But the contractor still thinks he has been delayed more than X days and he further thinks the delay was so unreasonable as to amount to a breach of contract, so he sues for damages for the breach. In such an action the findings of fact of the contracting officer are not final, because this is not a dispute 'arising under the contract.' It is only as to those disputes that the contract does make his findings final. In a suit for a breach because of an unreasonable delay, the court, in order to determine whether the delay was unreasonable and, hence, a breach of the contract, must determine the extent of the delay. In such a dispute the parties did not agree that the decisions of the contracting officer should be final and conclusive.

"In any case we would so construe the contract between the parties, but in this case there is a compelling reason to strictly limit the contract to its precise terms. It is well known that anyone seeking a contract with the Government must be willing to

agree to accept the contract drawn by the Government; indeed, the advertisement for bids so stipulates. These contracts all contain this 'disputes' clause, which makes the arbiter of the dispute in the first instance the contracting officer, who is the Government's servant and employee, and whose prime duty is to be diligent in the protection of the Government's interests and to require that the contractor strictly comply with the terms of the contract. The transition from such a role to that of an impartial arbiter in the settlement of a dispute between himself, or his representative, and the contractor would seem to be somewhat difficult. An appeal from the findings and decision of the contracting officer is allowed to the head of the department, but he, too, is an officer of the Government, the opposite contracting party. This is an additional and a cogent reason for limiting this provision of the contract to its precise terms. See *Langevin v. United States, supra; B-W Construction Co. v. United States, supra;* and *Miller, Inc. v. United States, supra.*

"The Atomic Energy Commission's advisory Board of Contract Appeals in the Appeal of *Utah Construction Company* (Docket No. 91) recognized its lack of jurisdiction to decide or to make findings concerning damages for breach of contract. It said:

> It is clear, in the light of the Board's decision in Appeal of Claremont Construction Company (Docket No. 64), that, not only does the Contractor's appeal on the issue of damages raise issues solely of law, but that this dispute is as to a matter 'relating to' and not one 'arising under' the contract. The Board has discussed this distinction at length in both that Claremont case and in Appeal of Frontier Drilling Company (Docket No. 74).

The reasoning need not be repeated here. As to this issue, the appeal should be dismissed as not within the jurisdiction of the Board.

"In conclusion, we hold that in a suit for breach of contract we are not bound by a finding of fact of the Board of Contract Appeals even though that finding is relevant to 'a dispute arising under the contract.'" (See Petition, Appendix A, pp. 25-26.)

2. There is no conflict or inconsistency between the opinion below and other rulings of this Court or of the courts of appeals.

A distinction can and should be drawn between disputes "arising under" the contract and that sort of omission or commission which constitutes an actual breach of contract.

There is no conflict in the cases cited by the petitioner such as to warrant review by this Court upon a theory of conflicting decisions in the Federal courts. Those cases which were decided before this Court's *Bianchi* ruling are even less indicative of conflict. This Court has consistently denied certiorari to review evidence and discuss specific facts. (See *United States v. Johnston*, 268 U.S. 220, 227.)

In the main case cited by petitioner, *United States v. Peter Kiewit Sons' Co.* (C.A. 8) 345 F.2d 879 (1965), the District Court ruled that Kiewit could elect to sue in tort or in contract; further, that the tortfeasor was within the "loaned servant" doctrine and his negligence was imputed to the Government.

Speaking for the Court of Appeals Judge Vogel said:

"It [the District Court] did not hold that the claim was not a dispute arising under the contract involv-

ing a question of fact, but held that Kiewit was 'free to treat the claim either as one sounding in tort or contract.' " (345 F.2d 829, 881.)

The Court of Appeals then held, entirely consonant with the *Bianchi* rule (though not citing the case), that Kiewit's claim was one arising under the contract and he was confined to resolution by administrative proceeding.

In other words, the Court of Appeals found *upon the specific facts of that case* that the claim *arose under* the contract and the parties were restricted to an action upon the contract. Judge Vogel was very careful to delineate that the claim was so characterized *and noted the particularity with which the parties had contemplated such a dispute in making their contract.*

The fact that Kiewit contended that the claim was for breach and not arising under the contract should surprise no one, and it does not create a conflict in the decisions. What is important is the characterization given the claim by the court. We could take issue with much of Judge Vogel's opinion but that case is not questioned here; whether or not the *Kiewit* decision deserves review, it does not establish conflict either with this case or *United States v. Bianchi.*

The remaining cases cited by petitioner under this subject head (pp. 13-14 of the Petition) are merely additional illustrations of the court's efforts to properly characterize the claim. In *United States v. Hamden Co-operative Creamery,* 297 F.2d 130, a summary judgment in the trial court was affirmed for the Government on the question of

sub-standard milk; in *Silverman Bros. v. U.S.*, 324 F.2d 287 the court relied on *Bianchi* to find the contractor had terminated his supply contract in violation of the contract provisions for default; and in *Allied Paint and Color Works v. United States*, 309 F.2d 133, the court held there was no breach but rather that pursuant to contractual risk of loss provisions the Government had fulfilled its contract. *The Allied decision recognized, however, that there would be situations where a trial de novo would be necessary.*

It is all very well to pick at individual decisions and to wish for a neat rule for review of all of the decisions of contracting officers and Boards, but unless this Court intends to either (1) have review of every inferior court determination as to what is subject to the "disputes" clause, or (2) make the contracting officer and the Board the final judges of ultimate questions of all contract rights as well as disputes over specifications, the Court of Claims and courts below should be allowed a reasonable opportunity to work out principles of law and review of disputes within the outlines laid down by this Court in *Bianchi*.

3 Review of the decision below would be premature and would interrupt the decisional process of the Court of Claims.

Earlier, in Part A of this argument, we set forth that the opinion below is a conditional ruling as to the procedures to be followed by the Court of Claims Commissioner; the rules of that Court are clear that it may modify or reject the report of the Commissioner which will be filed subsequent to the trial. *In effect there has*

been no "decision" by the Court on the issues of which the Government complains.

Review at this stage of the case cannot accomplish the far-reaching desires of the Government because there has been no decision by the Court of Claims upon which this Court could expostulate such a sweeping expansion of the review doctrine. In accord with its rules the Court of Claims could modify or completely revise the findings of its Commissioner. To interrupt the proceedings at this point would be a clear invasion of the prerogative of that court.

C. THE COURT OF CLAIMS HAS PROPERLY RULED THE ACTION BELOW TO BE FOR BREACH OF CONTRACT AND IT MAY TAKE EVIDENCE DE NOVO ACCORDING TO ITS OWN RULES AND PROCEDURES AS TO THE ORDER AND MANNER OF PROOF; THE CONTENTION OF THE GOVERNMENT, THAT ALL ACTIONS CONNECTED WITH CONTRACT—WHATEVER THE NATURE OF THE ACTION—MUST BE DECIDED UPON THE FACTUAL FINDINGS OF THE AGENCY BOARD, IS ERRONEOUS AND UNSOUND GOVERNMENTAL POLICY.

1. The Contractor's action is for breach of contract.

The claim of Utah Construction and Mining Co. is that the United States breached the contract between the parties and should respond in damages. It is a single, cumulative claim for breach of contract made up of a series of items. In considering whether the Court of Claims has reasonably held the claim to be outside of the disputes clause, it is necessary to consider certain allegations in the contractor's original Petition to the Court of Claims. The charging allegations are contained in paragraphs 4 and 6 of that petition.

The items of the contract which involved the majority of defendant's acts and omissions constituting breach are set out in paragraph 7 of Utah's Petition. These aspects are the so-called "claims." *It must be emphasized here that these items of the work are not urged by Utah as separate claims or as a series of breaches of the contract, despite the possible implication of the Court of Claims Commissioner to the contrary.* It is no answer to Utah's petition to say that an administrative claim has or has not been pressed as to some or all of these items. As is clearly stated in Utah's petition to the Court of Claims:

> "[It is] the acts of defendant with respect to major phases of said contract, hereinafter referred to, which independently and cumulatively constituted a breach of contract by defendant . . ." (Petition, paragraph No. 6.)

This is a distinction of the first magnitude and will of course be made clear to the Court of Claims at the time of the Commissioner's Pretrial Order. In fact much of the so-called "fact and law confusion" will be cleared up after the issues have been developed in proceedings before the Commissioner.

Bearing in mind that the contractor's Petition states a single claim for breach of contract, it must also be remembered that the administrative agencies, including the Atomic Energy Commission's Advisory Board on Contract Appeals, uniformly recognized and enforced the distinction between disputes "arising under" the contract and those disputes "relating to" the contract.

The records demonstrate that, during its brief lifetime, the Atomic Energy Commission's Advisory Board on

Contract Appeals uniformly held that claims for damages for breach of contract or delay-damages were beyond its jurisdiction and need not be presented to it. This decisional policy was as we have pointed out, consistent with the practice of all of the governmental Contract Appeals Boards.

For instance, in at least one controversy involving directly the contract which is the subject of the present litigation, the Board made such a ruling. The decision referred to is the one entitled *Appeal of the Utah Construction Company* (Docket No. 91) where the Board stated:

> "It is clear, in the light of the Board's decision in Appeal of Claremont Construction Company (Docket No. 64), that, not only does the *Contractor's appeal on the issue of damages raise issues solely of law, but that this dispute is as to a matter 'relating to' and not one 'arising under' the contract.* The Board has discussed this distinction at length in both that Claremont case and in Appeal of Frontier Drilling Company (Docket No. 74). The reasoning need not be repeated here. *As to this issue, the appeal should be dismissed as not within the jurisdiction of the Board.*" (Emphasis added.)

Of course, the identical "disputes" clause was interpreted in that appeal.

The *Claremont* case referred to in the last mentioned decision was a "Findings of Fact and Recommendation" issued by Dean Robert Kingsley on October 20, 1954 in the proceedings entitled Appeal of Claremont Construction Company (Docket No. 64). In that opinion, which

became the leading authority of the A.E.C. Appeals Board on this subject, Dean Kingsley declared:

> "The Contractor cites persuasive authority to the effect that, under a contract such as the one herein involved, the Commission's sole remedy was to terminate the contract under Article 9 and determine damages by a re-letting (see *U.S. v. Foley*, 329 U.S. 64; *Crook v. U.S.*, 207 U.S. 4; *U.S. v. Rice*, 317 U.S. 61; *Kelly v. U.S.*, 69 Fed. Supp. 117; 21 S.C. L. Rev. 36). However, the Board is convinced that *this issue is not a dispute that arises 'under' the contract and within the Board's jurisdiction, but rather is a matter of general law to be decided by a suit in the Court of Claims or in the District Court (cf. Appeal of Utah-Leavell,* Docket No. 51).
>
> Although a tentative opinion to the contrary was expressed at the hearing (Trans., pp. 17-20), the Board, on further reflection and with the benefit of briefs, concludes that *it likewise lacks jurisdiction to rule on the correctness of the measure of damages adopted by the Contracting Officer. Since the whole matter of damages (apart from action under Article 9) is outside the express contract language, it follows that the measure of damages is also a question of general law and not a 'dispute . . . under' the contract.*" (Emphasis added.)

It cannot be questioned that the whole course of administrative decisions on the pertinent issue ran directly contrary to the present contention of the Government. It would have been a futile act for a contractor claimant to have attempted to present before the Advisory Board on Contract Appeals of the Atomic Energy Commission a claim admittedly sounding of breach of contract and actionable misrepresentations by the Government.

That the Court of Claims in the opinion below viewed Utah's action as one for breach of contract is indisputable. The holding of the Court of Claims is supported by both the Commissioner's rulings and a myriad of decisions of agency boards and contracting officers.

As to the "pier drilling" phase we recall to the Court's attention the agency board ruling that faulty plans did not *proximately* cause delay to the contractor's work. The Commissioner's Memorandum made this statement as to the breach of contract aspect (see Petition, Appendix B, pp. 42-43):

> "The net effect of the foregoing recital of administrative proceedings is that *first*, the Board has ratified the decision of the contracting officer that the plaintiff's excavation difficulties at the outset of the contract were not responsible for the delay in pouring concrete in the winter months and the consequent winter protection expenses; and *second*, the plaintiff has failed to exhaust any administrative remedy it might have with reference to the excessive drilling costs it experienced as the result of changed subsurface conditions found by the Board.
>
> "The Board had no authority to adjudicate the first element of plaintiff's claim because the relief sought was for the recovery of unliquidated damages for delays allegedly caused by the Government. The Board's sole power under the contract was to adjudicate equitable adjustment for the changed subsurface conditions, and the plaintiff's expenses providing winter protection for the freshly poured concrete could not be paid as part of an equitable adjustment because it was not expended in direct relation to the drilling either in point of time or in function. Since the Board could not adjudicate such a claim, its find-

> ings as to the cause of the delay lack the finality accorded by the disputes clause, to findings of fact under the Disputes Clause, for findings made as to facts underlying a claim cognizable only in the courts are merely advisory. Therefore, in reviewing the decision on this element of the claim the court is not restricted to the administrative record but may receive and consider evidence *de novo*."

In the hearings on the concrete aggregate phase the contracting officer filed a brief in which he stated:

> "Conclusion: The conclusion is compelling that the contractor's claim is *solely* a claim for damages for breach of contract or breach of warranty;"[4]

The Hearing Examiner, in ruling, said:

> "The Contracting Officer also contends that the standard changed condition clause applies generally to an unknown underground condition related specifically to the main objective of the work to be accomplished, such as an excavation needed for footings for a building contracted to be constructed. For those situations, however, of conditions that are readily observable the Contracting Officer contends the relief under a changed conditions clause is not available, and while a hearing on the merits might better enable the Contracting Officer to present the factual support for this contention, the disposition of the claim as untimely obviates a determination of that phase of his contention. *Likewise, if Utah argues that the description of the aggregates as 'suitable' implied any warranty as to condition, or fraud in that representation, the remedy for unliquidated damages is beyond the*

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[4]Brief of the Contracting Officer on Motion to Dismiss for Lack of Jurisdiction, Docket No. 121 AEC Hearing Examiner for Contract Appeals.

jurisdiction of this proceeding." (Hearing Officer's Decision dated October 1, 1959, Docket No. CA-121, p. 12.)

Of course, that is the very contention of Utah in the case before the Court of Claims. See Petition, U.S. Court of Claims, No. 3-61, pp. 5, 8, 18.

2. The contention of the government that all actions connected with the contract—whatever the nature of the action—must be decided upon the factual findings of the agency board is erroneous and unsound governmental policy.

This contention of the Government goes far beyond the holding in the *Bianchi* case, it is beyond the intent of the Wunderlich Act, and beyond any reasonable interpretation of the standard "disputes" clause in Government contracts.

This sweeping attempt to interpret plain language is not supported by any reference to the express words that support it, or to any legal authority suggesting such an interpretation.

As the majority opinion of the Court of Claims pointed out:

> ". . . No statute gives the contracting officer and the head of the department, or his representative, authority to decide the rights of the parties to a Government contract; their authority is derived solely from the contract between the parties.
>
> ". . . [T]he board's authority is limited to disputes 'concerning questions of fact *arising under this contract.*' . . . The parties did not contract that *their findings of fact should be conclusive in suits for breach of contract.*" (Emphasis in the original.) (See Government's Petition, App. A, p. 23.)

Utah Construction and Mining Company never agreed, in the pertinent contract or otherwise, to permit any Government representative (whether contracting officer, agency contract appeals board, or Department of Justice official) to decide all questions of fact arising under its contract. Furthermore, under the contract procedures it only agreed to have individual items of dispute determined one by one. Neither party to the contract ever contemplated or referred to any right of a Government representative to determine an overall, cumulative action for breach of the contract.

This claim of the Government goes far beyond anything that even its own advocates have ever contended for in the long history of litigation over Government contracts. Its contention stands without the slightest bit of respectable authority or convincing reason. It should not, we respectfully submit, be dignified by gaining the attention of this Court by way of a writ of certiorari.

CONCLUSION

For the reasons presented in this brief the Supreme Court does not have jurisdiction to review this case in its present posture. But in any event, the writ would be premature at this time.

The Court of Claims has properly ruled that the claim of Utah Construction and Mining Co. is beyond the scope of the standard "disputes" clause. The claim is presented upon a theory of relief which was not available administratively. It must therefore be considered as an original

matter and the Court of Claims should be allowed to preside over the order and manner of proof and the taking of evidence.

For the foregoing reasons the petition for a writ of certiorari to the Court of Claims should be denied.

Dated, San Francisco, California,
October 5, 1965.

Respectfully submitted,

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